IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs May 21, 2008

DAVID H. PLEMONS, JR. v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Marshall County
No. 17130 Robert Crigler , Judge

No. M2007-00549-CCA-R3-PC - filed December 2, 2008

The petitioner, David H. Plemons, Jr., appeals the Marshall County Circuit Court's denial of his petition for post-conviction relief. The petitioner was convicted of second degree murder and is currently serving a sentence of nineteen years in the Department of Correction. On appeal, he argues that he was denied his Sixth Amendment right to the effective assistance of counsel, specifically arguing that trial counsel was ineffective in: (1) failing to adequately confer with, meet with, and/or communicate with the petitioner regarding the merits of the case so that the petitioner could make an informed decision as to whether to proceed to trial or settle the case; and (2) effectively precluding the petitioner from exercising his right to testify. After review, the judgment of the post-conviction court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., joined.

Hershell D. Koger, Pulaski, Tennessee, for the appellant, David H. Plemons, Jr.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; Charles F. Crawford, Jr., District Attorney General; and Weakley E. Barnard, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

The underlying facts of the case, as recited in the post-conviction court's Memorandum Order, are as follows:

> On the morning of September 4th, 2002, Deputy James Darnell, went to the victim's trailer in response to a dispatch call about a possible suicide attempt.

Deputy Darnell saw the victim walking up the road from the direction of the [petitioner's] trailer, which was within one tenth of a mile of the victim's residence. The victim said he did not intend to harm himself but he had taken too much medication because he was mad at his mother. The victim agreed to go to the hospital in an ambulance with paramedics who had arrived. Deputy Darnell was called back to the hospital when advised that the victim had become "a little unruly" but eventually drove the victim back to his trailer in the early afternoon.

A little over fifteen minutes later, Deputy Darnell received a dispatch that the [petitioner] shot the victim at the [petitioner's] address. When Deputy Darnell arrived, the victim was dead with a visible gunshot wound on his face; lying on the ground with his feet on the steps to the [petitioner's] trailer. The [petitioner] walked from his trailer with his hands up and Deputy Darnell handcuffed the [petitioner].

> [The petitioner] told me he was sorry, but he didn't think he had [any] other choice, that [the victim] had come in his yard, slung his gate open, kicked his grill over, was cussing him and threatening to come in and whip his and his wife's asses. . . . He was trying to get in the house.

There were "human teeth and skull fragments scattered on the floor, blood spots on the wall" inside the [petitioner's] trailer as well as a shotgun standing up against a chair and a shell lying on the floor.

The victim and the [petitioner] had been friends. Michelle Plemons, the [petitioner's] wife, testified that the victim came to their trailer almost every day, usually two or three times a day. She and the [petitioner] drove the victim wherever and whenever he needed to go anywhere.

The day before the shooting, she and the [petitioner] drove the victim to visit his mother in Franklin. On this trip the three each took one of the victim's Klonopin pills and the victim and the [petitioner] drank beer. Then they went to Nashville and bought cocaine. The victim injected some cocaine with a needle while the three drove home where all three finished the cocaine back at the [petitioner's] trailer. Later, they returned to Nashville and bought more cocaine and then returned home with the victim leaving around 4:30 a.m. at which time she and the [petitioner] went to bed. She awoke later that morning to the sound of the victim's voice on their answering machine cursing about why they weren't answering their phone. Thereafter, the victim called and spoke with the [petitioner]. She told investigators the [petitioner] was yelling and refused to drive the victim somewhere. When the [petitioner] saw the victim through the window, the [petitioner] picked up the 12-gauge shotgun he kept next to the door.

> The trailer had two doors, a storm door and a metal main entry door. The main door had a "twist-type" deadbolt lock. Ms. Plemons said the [petitioner] could have locked the deadbolt instead of picking up the shotgun. Ms. Plemons had told the police twice that the [petitioner] opened the interior door. At first, she was unsure whether one or both of the victim's feet entered the trailer before the [petitioner] shot him, but also said the victim was completely inside and fell against the door frame and "slid down" out of the trailer, down the steps. The victim was unarmed. Barbara Land, the victim's mother, testified that the victim said he was going to "turn [the petitioner] in for growing marijuana." The [petitioner's] first cousin, Robert Crafton, testified that on the phone the next morning the [petitioner] stated, 'what did I tell you I would do to the mother f***er that came down here f***ing with me.'

Based upon the above actions, the petitioner was indicted for second degree murder, and a jury trial was held, at which the petitioner pursued a defense of self-defense. *See State v. David Hopkins Plemons, Jr.*, No. M2004-00460-CCA-R3-CD (Tenn. Crim. App., at Nashville, Feb. 24, 2005). At trial, investigators testified that, based upon the evidence at the crime scene, the victim was standing inside the screen door, but not inside the interior door, when he was shot by the petitioner. *Id*. Additionally, according to a TBI agent, the petitioner's wife's version of the events "was impossible." *Id*. The petitioner's statement, taken one and one-half hours after the shooting, was read into evidence by the TBI agent and is as follows:

> On 9/3/02, I took [the victim] to get his Social Security Check and to get it cashed. I have known him all my life. I have treated him like a brother. I have taken him to doctors all over the place. He ask[ed] me yesterday to get him some cocaine and other stuff [and] drugs. He finally did get some Klonopin. He had a refill at Kroger's, and I didn't know it. Today he called me up and he said that he wanted me to take him to get some dope. I said no that I wasn't going to do it. It made him mad. Before that he had come to my house. I was drinking coffee and it was this morning. He ask[ed] me to go with him to his house to call his mama. My wife was asleep. When he called his mama, he began to yell and told her, "I am going to kill you, you f***in b****." . . . He called Ms. Sparks, the lady that owns the land he lives on. . . . He also told her that he was going to be the worst hell-raiser there ever was till she threw him off the place. . . . He told her "you f***king fat b****, I ain't paying no more rent." He yelled at her and carried on. I left him and walked home. A while later [the victim] called me and left a message. He was yelling for me to answer the phone. I was asleep or outside or something. He was raising hell. He called again and was yelling and talking fast. I hung up on him. He called again and said he didn't like me hanging up on him. Then he hung up on me. . . . I was in bed and la[i]d back down after he hung up. . . . The next thing I knew he walked down to my house and opened the front gate. He left the gate open. I always keep that gate closed because of my chickens. I have a shotgun. . . . I keep it by the front door. Sometimes I keep it loaded. When [the victim] got to my house he started beating

> on the front door. He was yelling, "open the door, you mother f***er . . . I'll show you, you son of a b****." I opened the front door and tried to reason with him. He had the storm door open and was already on the top step. He pushed on the metal door, and I tried to keep it closed. He said, "I ain't afraid of you or that shotgun." When he came inside, I shot him. I shot him back out the door. I had already told him on the phone to leave me alone that I wasn't taking him anywhere else. When he pushed his way inside of my house, I shot him.

Id. The agent also gave testimony that the petitioner, when asked why he shot the victim, stated, "I was scared for my life. [The victim] has beat me, stole from me; and I was afraid of him." *Id*.

Following the presentation of evidence, the petitioner was convicted of second degree murder and sentenced to a term of nineteen years in the Department of Correction. *Id*. A panel of this court affirmed the conviction and sentence on direct appeal. *Id*.

The petitioner subsequently filed a *pro se* petition for post-conviction relief, and two amended petitions were filed following the appointment of counsel. An evidentiary hearing was held, at which the petitioner, his sister, his father, and trial counsel testified. The petitioner testified that he was currently incarcerated, serving the nineteen-year sentence in this case, as well as a concurrent three-year and nine-month sentence for manufacturing marijuana. He related that his sister had retained trial counsel and an investigator upon trial counsel's suggestion. According to the petitioner, he only met with trial counsel three or four times, and his family was present at all the meetings. The petitioner testified that trial counsel repeatedly told him he was certain that he could prove self-defense at trial.

The petitioner stated that he informed trial counsel that he was disabled and suffered from several mental conditions, including paranoid schizophrenia. According to the petitioner, trial counsel did not pursue this information and did not consider using this information as part of his defense. However, the petitioner admitted that he had gone to Centerstone, a mental health facility, and acknowledged that he was found to be competent to stand trial, that an insanity defense could not be supported, and that there did not appear to be a basis for a claim of diminished capacity. Additionally, the petitioner testified that trial counsel informed him of a plea offer from the State which would resolve both the murder charge and the pending marijuana charge. According to the petitioner, trial counsel informed him that even if they proceeded to trial, he would receive no more than the twelve-year sentence offered by the State. The petitioner testified that he rejected the offer based upon trial counsel's statements.

The petitioner also testified that he did not hear the 911 tape or see the photographs of the crime scene until they were introduced at trial. He did acknowledge that his wife was present at the meetings with counsel and that trial counsel did discuss her testimony with her. However, he testified that her testimony on cross-examination was a surprise and hurt his case. He also stated that he was not aware that the victim's mother was going to testify that the victim said he was going to turn the petitioner in for growing marijuana, which the petitioner stated established the only evidence

of motive for the murder. The petitioner did acknowledge that he was shown a copy of the State's witness list prior to trial; however, he denied that he ever saw a copy of the private investigator's reports. According to the petitioner, all of this evidence made him look guilty, and he would have settled the case rather than going to trial if he had known about it. The petitioner stated that he intended to testify at trial, but trial counsel advised him against it, telling him that the State would use the marijuana charge and his past criminal history against him. He testified that if he had taken the stand, he would have informed the jury of what really happened between himself and the victim, informing the jury about the altercation he had with the victim prior to his arrival at the petitioner's house. He did, however, acknowledge that his wife also testified regarding these events and that his statement containing that information was admitted.

According to the petitioner, counsel informed him just prior to trial that, if he were convicted, he could possibly receive a twenty-five-year sentence. The petitioner acknowledged that he was aware that the murder charge carried a sentence range of fifteen to twenty-five years. The petitioner testified that he then requested that counsel plea bargain the case, but the subject was not discussed further. The petitioner testified that he informed counsel that he would only plead guilty to voluntary manslaughter and accept a sentence of three to six years.

The petitioner's sister and father also testified. Each testified that they were present at all or some of the meetings between the petitioner and trial counsel. Each stated that they heard trial counsel inform the petitioner of the State's offer of a twelve-year plea agreement, six years for the second degree murder and six years for the marijuana charge. According to their testimony, trial counsel stated the petitioner should go to trial because they had a good self-defense case. The petitioner's sister contradicted the petitioner's testimony and said that they had met with trial counsel approximately twenty times, rather than the three or four testified to by the petitioner. She also testified that trial counsel did discuss a mental health defense, but, after discussion, they agreed that the self-defense theory was more appropriate to pursue.

Trial counsel testified and refuted much of the petitioner's testimony. He testified that he met with the petitioner and various family members approximately twenty times prior to trial. According to trial counsel, he received full discovery from the State and shared all the information he received with the petitioner and his family. He specifically testified that he reviewed both a videotape of the crime scene and the tape of the 911 call with the petitioner. He stated that he reviewed the State's witness list with the petitioner and that the list included the victim's mother, the petitioner's wife, and the petitioner's cousin Daryl Crafton. He testified that the private investigator had attempted to interview the witnesses, but several of them refused to speak with him.

According to trial counsel, they discussed pursuing self-defense, as well as a defense based upon the petitioner's mental disorders. However, based upon the evaluation performed on the petitioner, it was decided that the more appropriate defense to pursue was one of self-defense. Counsel specifically stated that he informed the petitioner of the various defenses available and that, ultimately, the decision was the petitioner's.

With regard to a plea agreement, trial counsel testified that he did not tell the petitioner or his family that the State had offered a twelve-year deal. Rather, he stated that he informed them that the State would probably not make an offer in this case but that they could approach the State with an offer. He further informed them that he did not believe the State would accept any offer below twelve to fifteen years, and he informed the petitioner that, if convicted, the sentencing range for second degree murder was fifteen to twenty-five years. According to trial counsel, the petitioner never authorized him to approach the State with an offer. He also informed the petitioner that even though he believed the evidence was sufficient to get a jury instruction on self-defense, the instruction did not insure the jury would accept the defense.

After hearing the evidence, the post-conviction court found that the petitioner had failed to establish his claim of ineffective assistance of counsel and denied post-conviction relief. This appeal followed.

Analysis

On appeal, the petitioner has raised the single issue of ineffective assistance of counsel. To succeed on a challenge of ineffective assistance of counsel, the petitioner bears the burden of establishing the allegations set forth in his petition by clear and convincing evidence. T.C.A. § 40-30-110(f) (2006). The petitioner must demonstrate that counsel's representation fell below the range of competence demanded of attorneys in criminal cases. *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). Under *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984), the petitioner must establish (1) deficient performance and (2) prejudice resulting from the deficiency. The petitioner is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy, and cannot criticize a sound, but unsuccessful, tactical decision made during the course of the proceedings. *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). This deference to the tactical decisions of trial counsel is dependent upon a showing that the decisions were made after adequate preparation. *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

It is unnecessary for a court to address deficiency and prejudice in any particular order or even to address both if the petitioner makes an insufficient showing on either. *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069. In order to establish prejudice, the petitioner must establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Burns*, 6 S.W.3d 453, 463 (Tenn. 1999) (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068).

The issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact. *Id.* at 461. "[A] trial court's *findings of fact* underlying a claim of ineffective assistance of counsel are reviewed on appeal under a *de novo* standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise." *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001) (citing Tenn. R. App. P. 13(d); *Henley v. State*, 960

S.W.2d 572, 578 (Tenn. 1997)). However, *conclusions of law* are reviewed under a purely *de novo* standard with no presumption that the post-conviction court's findings are correct. *Id.*

Initially, the petitioner asserts that the standard of proof required to establish ineffective assistance of counsel is not "clear and convincing evidence" but, rather, is by "a reasonable probability that the result of the proceeding would have been different." He asserts that the standard of clear and convincing evidence, which he acknowledges is mandated by statute as well as Tennessee Supreme Court case law, "is incorrect and contrary to the Constitutional standards established by the U.S. Supreme Court." He relies upon *Williams v. John Taylor, Warden*, 529 U.S. 362, 405-06, 120 S. Ct. 1495, 1519 (2000), to support his argument, specifically the following language:

> A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. Take for example, our decision in *Strickland v. Washington*. . . . If a state court were to reject a prisoner's claim of ineffective assistance on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be "diametrically different," "opposite in nature," and "mutually opposed" to our clearly established precedent because we held in *Strickland* the prisoner need only demonstrate a "reasonable probability that . . . the result of the proceeding would have been different.

However, a reading of *Williams* leads to the conclusion that the petitioner's argument is misplaced. The case involves establishing the prejudice prong of an ineffective assistance of counsel claim. We would agree that the correct legal standard for establishing prejudice, pursuant to *Strickland*, is showing a "reasonable probability that . . . the result of the proceeding would have been different." However, *Williams* does not stand for the proposition that the standard applies to the entire ineffective claim. Thus, we find no merit to the petitioner's contention. We would also note that, as a lower court, we are bound by the decisions of our supreme court and their interpretations of the laws enacted by our legislature.

I. The Petitioner's Decision to Proceed to Trial

The petitioner contends that trial counsel was "ineffective in that he failed to adequately confer, meet, and/or communicate with [him] regarding the merits of the case, the contents of discovery provided by the State - particularly the 911 tape - and improperly advised [him] such that [he] was not sufficiently informed to allow him to make a fully informed decision whether to go to trial or settle the case prior to trial." He asserts that the proof presented, specifically that trial counsel represented that "he could beat the State's offer at trial and that the case was 'open and shut' with regard to the merits of the self-defense defense," preponderates against the post-conviction court's finding that he "failed to prove by clear and convincing evidence that his failure to plead guilty did not represent a voluntary and intelligent choice among alternative courses of action open to him."

In finding that the petitioner was not entitled to post-conviction relief on this issue, the trial court made the following findings and conclusions:

> The [petitioner] and [trial counsel] agreed to defend the case on the basis of self-defense and defense of third persons. The Post-Conviction Court finds that under the facts of this case this strategic decision was the logical and obvious defense. The trial court instructed the jury regarding self-defense and defense of third persons, Exhibit Five. The [petitioner] is not entitled to post-conviction relief simply because the jury rejected the defense. Furthermore, on appeal the Court of Criminal Appeals held that the evidence was sufficient to support the conviction. The post-conviction court finds that [trial counsel] was well prepared to pursue this defense and pursued it ably at trial.
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> The [petitioner] also testified that a private investigator was hired to assist [trial counsel] and that he, the [petitioner], met with the investigator more times than with [trial counsel]. Exhibit Four, the investigator's report, and Exhibit Seven, [trial counsel's] trial notebook, both reflect considerable work and the court finds that [trial counsel] thoroughly investigated the case in all respects, adequately advised the [petitioner] throughout his representation and performed at trial and on appeal above "the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 [S.W.]2d 930 (Tenn. 1975).
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> The [petitioner] admitted that [trial counsel] was aware that the [petitioner] suffered from several psychological disorders. The [petitioner] was, in fact, evaluated and found competent to stand trial, Exhibit One. This report further finds neither that the defense of insanity nor diminished capacity could be support[ed]. [Trial Counsel's] decision to concentrate on self-defense was, as stated above, the logical and obvious defense strategy.
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> . . . .
>
> The [petitioner] complains that he had not reviewed the 911 tape played at trial. Assuming, arguendo that this is true, the [petitioner] failed to prove that this affected the outcome of the trial or any strategic decisions.
>
> The [petitioner] admitted that [trial counsel] and he went over the State's witness list and that he knew his wife was on the list. The [petitioner] testified that he was not aware that the victim's mother could testify, but again the [petitioner] failed to prove at the post-conviction hearing that this affected the outcome of the trial or any strategic decision.
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> . . . .

> The [petitioner] offered conflicting testimony about settlement negotiation, but at one point did acknowledge that [trial counsel] told him he could get twenty-five years. [The petitioner] failed at the post-conviction hearing to prove that the State actually made a plea bargain offer which the [petitioner] could have accepted in lieu of going to trial. The [petitioner's] testimony that he and [trial counsel] talked to one another about possible settlement does not prove that there was an actual offer on the table from the State which the [petitioner] would have accepted. Thus, the [petitioner] failed to prove by clear and convincing evidence that his failure to plead guilty did not represent a voluntary and intelligent choice among alternative courses of action open to him. Accordingly, there is no showing of an abridgement of a constitutional right that would entitle him to post-conviction relief. . . .

After review of the record, we find nothing to preponderate against the post-conviction court's findings. Of particular importance, as noted by the trial court, is the petitioner's failure to establish that a plea agreement was actually offered by the State. He offers only his self-serving testimony, corroborated only by his family members' testimony, that he was ever informed of a twelve-year agreement. Trial counsel refuted that testimony, specifically stating that no plea agreement was offered and that the petitioner had not authorized him to approach the State regarding an offer. The post-conviction court obviously accredited trial counsel's testimony. It is not the province of this court to revisit issues of credibility of witnesses. *Black v. State*, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990). Failing to establish the existence of an offer refutes the petitioner's argument that he was not adequately informed to make a choice among the alternatives, as no option other than to proceed to trial existed.

Regardless, the record further supports that trial counsel more than adequately investigated the facts of the case and possible strategies to pursue at trial and sufficiently met with and discussed the case with the petitioner. Trial counsel testified that he received discovery from the State, including the 911 tape and the crime scene video, and that he reviewed the materials with the petitioner. He also testified that he was aware of the petitioner's mental conditions, but, based upon the evaluation, the decision was made to pursue self-defense. We agree with the post-conviction court that the petitioner has not established his claim and is, thus, not entitled to relief.

II. Right to Testify

Next, the petitioner contends that trial counsel was ineffective "in that [trial] counsel effectively precluded [the p]etitioner from knowingly and intelligently exercising his right to testify" because trial counsel "failed to sufficiently confer with [the p]etitioner and adequately inform [the p]etitioner to the degree that [the p]etitioner was unable to make an informed decision regarding his right to testify." He asserts that he established this abridgement of his constitutional right and further, relying upon the factors in *Momon v. State*, 18 S.W.3d 152 (Tenn. 1999), that the violation is not harmless beyond a reasonable doubt.

The petitioner is correct that the right of a defendant to testify in his own trial has been recognized by the Tennessee Supreme Court as a fundamental constitutional right and that the right must be personally waived by the defendant. *Momon*, 18 S.W.3d at 162. Moreover, "[g]enerally, a right that is fundamental and personal to the defendant may only be waived if there is evidence in the record demonstrating 'an intentional relinquishment or abandonment of a known right or privilege.' The waiver of a fundamental right will not be presumed from a silent record, and the courts should indulge every reasonable presumption against the waiver of a fundamental right." *Id*. at 161-62.

In denying relief on this ground, the post-conviction court found as follows:

> The [petitioner] testified that he decided not to testify after [trial counsel] told him he would be cross-examined about the manufacture of marijuana. The Court finds that since there was proof in the State's case-in-chief that the victim had threatened to turn the [petitioner] in for marijuana, [trial counsel] correctly advised the [petitioner] on this issue. Further, the trial court addressed the [petitioner] about the decision of whether to testify and the [petitioner] clearly told the trial court that he chose not to testify, Exhibit 6C pages 540, 541. Further, the [petitioner] testified at the post-conviction hearing about what he would have said if he'd testified at trial. The jury heard essentially the same testimony in the form of the [petitioner's] statement. Accordingly, the [petitioner] was able to advance his self-defense argument without being cross-examined.

Again, we find nothing to preponderate against the post-conviction court's findings, as the record supports a valid waiver of the right by the petitioner. The record on appeal includes the voir dire of the petitioner conducted by the trial court and trial counsel and indicates that the petitioner, after being informed of the right in open court, stated that it was his decision not to testify in his defense. Moreover, at the post-conviction hearing, the petitioner also specifically testified that it was his choice not to testify in his own defense because trial counsel informed him, correctly, that the pending marijuana charge could be used to impeach him. Thus, the post-conviction court found that the petitioner knowingly, voluntarily, and intelligently waived his right to testify. As noted by the *State*, because the petitioner failed to establish the abridgement of his constitutional right to testify, the *Momon* factors relied upon by the petitioner are not relevant to our determination. Moreover, as the post-conviction court also found, the petitioner failed to establish prejudice as his statement containing the same information was introduced at trial. Thus, the petitioner has not established his claim.

CONCLUSION

Based upon the foregoing, the denial of the petition for post-conviction relief is affirmed.

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JOHN EVERETT WILLIAMS, JUDGE